84-906

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

GARY CARSON PRO SE, PETITIONER

v.

WESTERN ELECTRIC CO., INC.
NOW DOING BUSINESS AS AMERICAN TELEPHONE
AND TELEGRAPH TECHNOLOGIES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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43PP

QUESTIONS PRESENTED

A Court of Appeals issued a judgement affirming an opinion and order of a District Court:

1. This is a mixed question of law and fact. Whether or not the Circuit Court of Appeals' opinion contains separately stated findings of fact and conclusions of law: (a)whether of not that court properly applied the law to whatever those facts were.

2. May a court of appeals properly invoke Rule 52(a), Federal Rules of Civil Procedure, U.S.C. 28, without separately stating its findings of fact and conclusions of law: (a)without finding every fact material to its conclusions, and, (b)did the District Court prejudice petitioner's right to a fair hearing on

appeal by not providing subsidiary findings of fact and its conclusions of law.

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Sixth Circuit are listed in the Caption, to wit: 1) Petitioner Gary Carson is a Black male citizen of the United States and upon filing in the District Court was a resident of the City of Pataskala, County of Licking and State of Ohio; 2) Respondent Western Electric Company has been and is now a Corporation doing business in the City of Columbus, County of Franklin and State of Ohio.

CORPORATE PARTY'S AFFILIATIONS

Petitioner Gary Carson is a private United States Citizen with no corporate affiliations.

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OPINIONS BELOW

The opinions of the District Court and Circuit Court of Appeals are reprinted in the Appendix.

PETITION FOR CERTIORARI JURISDICTION

Gary Carson, your petitioner Pro Se, hereby draws near to the High Court and respectfully prays and cries that a Writ of Certiorari be issued to the United States Court of Appeals for the Sixth Circuit, formerly Case No. 32-3741 to review its final order issued as Mandate on August 22, 1984, (is appended hereto as petitioner's Exhibit "A"), affirming the District Court's opinion and order dismissing petitioner's Cause. The District Court's opinion was filed October 5, 1982 (Appendix "B"). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §2106, 62 United States Statutes at Large, 963, and 18 United States Statutes at Large, Chapter 77 at page 315.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

The Constitutional Provisions involved are contained in the Fourteenth Amendment, shown below in pertinent part:

"AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The statute regulating the contents of the District Courts' judgment decrees when promulgated, and upon which the Circuit Court invoked, is Rule 52(a)

of the Federal Rule of Civil Procedure §28 U.S.C. in pertinent part:

> "Rule 52. Findings by the Court
>
> (a) Effect. In all actions tried upon the facts without a jury of with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein . . ."

The Statutes pertaining to this Court's Jurisdiction and ultimate determination are respectively 28 U.S.C. §2106, 62 Stat. 963,

"§2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

and:

The Public Acts of the Fourth Third Congress, 18 United States Statutes At Large (Chapter 77 at page 315, Volume 3 which is an act to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes, appears in pertinent part:

"Be it enacted by the Senate and House of Representatives of the United

States of America in Congress Assembled. That the circuit courts of the United States in deciding causes . . . upon which its renders it judgments or decress, and shall state the facts and conclusions of law separately . . . The review of the judgments and decrees entered upon such findings by the Supreme Court, upon appeal, shall be limited to the questions of law arising upon the record, and to such ruling of the circuit court expected to at the time, as may be presented by a bill of exceptions, prepared as in actions of law. Sec. 2. That this act shall take effect on the first day of May, eighteen hundred and seventy-five."

Approved February 16, 1875.

and:

The Federal Rules of Evidence:

"On November 20, 1972, the Supreme Court promulgated the Final Draft, as amended in 1972, as the Federal Rules of Evidence, with Mr. Justice Douglas dissenting.

The Court Ordered:

1. That the rules hereinafter set forth, to be known as the Federal Rules of Evidence, be, and they hereby are, prescribed pursuant to Sections 3402, 3771 and 3772, Title 18 United States Code, and Sections 2072 and 2075, Title 28 United States Code, to govern procedure, in the proceedings and to the extent set forth therein, in the United States courts of appeals, the United States district courts, the District Court for the District of the Canal Zone and the district courts of Guam and the Virgin Islands, and before the United States magistrates.

2. That the aforementioned Federal Rules of Evidence shall take effect on July 1, 1973, and shall be applicable to actions and proceedings brought thereafter and . . ."

Which further, and more specifically appear in pertinent part:

"Rule 102, Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

"Rule 103, Rulings on Evidence

(d) Plain Error - Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge."

and:

This case below involves The Civil Rights Act of 1964, Title 42 U.S.C. §2000(e) et seq. and §1981 which respectively appear in pertinent part:

§2000e-2. Discrimination because of race, color, religion, sex or national origin

(a) Employers. It shall be unlawful employment practice for an amployer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

"§1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory

to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

STATEMENT OF THE CASE

The jurisdiction of the Dictrict Court was invoked pursuant to the provisions of Title VII of the Act known as "The Civil Rights Act of 1964", Title 42, United States Code §2000(e), et. seq. and 42 U.S.C. §1981, this being a suit brought by a Black plaintiff who as been denied his civil rights through the unlawful employment practices of the defendant.

Respondent Western Electric Company, Inc., now doing business as American Telephone and Telegraph Technologies has been and is now a corporation doing business in the City of Columbus, County of Franklin and State of Ohio. Respondent has been and is now an employer within the meaning of

Title 42 U.S.C. §2000(e) (g) and (h).

Petitioner has complied with all conditions precedent to filing suit under Title 42, U.S.C. §2000(e). He filed a timely charge with the district director of the Equal Employment Opportunity Commission (hereinafter referred to as (E.E.O.C.). On September 20, 1977, petitioner received a notice under the provisions of Section 706(e) of Title VII that he had a right to bring a civil action in a United States District Court, which petitioner accomplished on December 15, 1977 in the United States District Court for the Southern District of Ohio.

Petitioner maintains that Respondent discriminated against him by: (1) failing to protect him adequately from racial harrassment by fellow

employees; (2) "disciplining" him in a disparate manner, and; (3) ultimately refusing to allow him to return to work from a sick leave, thus terminating his employment.

Petitioner's former union, The International Brotherhood of Electrical Workers, (hereinafter, I.B.E.W.) was also named defendant, and the Court granted defendant I.B.E.W.'s motion to dismiss the claims against it pursuant to Rule 40(B) of the Federal Rules of Civil Procedure.

Whereunto, petitioner suffering an aggravation of his pre-existing nervous condition, sought relief to include the sum of Two Million and 00/100 Dollars ($2,000,000.00) for the loss of employment; and punitive damages in the sum of Seven Hundred Fifty Thousand

and 00/100 Dollars ($750,000.00).

The case was tried to the Court, the Honorable Robert M. Duncan presiding, for nine (9) days, beginning March 1, 1982. On October 5, 1982, the Court ordered judgment in favor of Respondent regarding Petitioner's allegations with judgment in favor of Plaintiff on defendant's counter claim and dismissed petitioner's cause.

The record consisted of four volumes of pleadings, nine volumes of trial transcripts, three volumes of deposition, one volume of exhibits. The record included oral testimony which was heavily supported by documents which bear on the question for decision and testimony from witnesses not appearing in person. The clear and non-disputed facts include, but are not limited to:

1. Respondent Western Electric, prior to trial, believing Black petitioner to have been mentally incompetent with an infant-like mentality and not capable of handling his personal affairs and further thinking petitioner required the services of a guardian ad litem for his own protection filed with the District Court as docket entry Number 7, on February 8, 1979 a Motion Of Defendant For Appointment of A Guardian Ad Litem For Plaintiff And Associated Motions.

2. Respondent, in support of its motion presented, in camera, to the District Court, medical documentation, opinions, evaluations, and oral testimony from its medical director and likewise from its specially selected private practicing psychiatrist from the local community. The period of time

at issue therein covered all of the employment controversies and aspects complained of at trial: (a)respondent's failure to protect plaintiff adequately from racial harrassment from fellow employees; (b)respondent's "disciplining" plaintiff in a disparate manner; (c) respondent's refusal to allow plaintiff to return from a sick leave, thus terminating his employment.

3. Upon all of the issues adjudicated in the courts below, and arising out of his employment, petitioner, who being a member of a class entitled to the protection of Title VII, had established that he was accorded treatment different from that accorded persons otherwise similarly situated who were not a member of his class, had established a prima facia case raising the presump-

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tion of intentional discrimination by respondent.

4. Respondent's medical director, whose psychiatric testimony weighed heavily upon the District Court for decision was not a psychiatrist and woefully incompetent on the record to testify as a medical witness, by schooling, training and experience.

5. Respondent's sole reason for terminating Black petitioner's fourteen-year livelihood, a substantial constitutionally protected property right, was because he failed to provide respondent's medical director with a written release to allow him to gain legal access to all of his medical records.

6. Respondent had a nineteen-year uniform past practice of allowing similarly situated white employees to return to work.

7. The District Court's opinion is void of any reference to the above respondent's characterization, belief and material representation that Black petitioner was mentally incompetent therein.

8. Although petitioner perfected a timely appeal of the District Court's adverse decision, he was denied his opportunity to oral argument by the Circuit Court via a letter from the Clerk filed February 29, 1984 which appears in pertinent part:

> "The Court is expecting that this case will be submitted on briefs without oral argument. If either party has additional arguments they would like to present to the court prior to submission, those arguments should be submitted in writing not later than March 21, 1984.

You will be promptly advised when the court reaches its decision in the case."

9. During the proceedings before the Circuit Court of Appeals, the material issue "That there were no findings of facts and conclusions of law in the District Court's opinion and order" was raised by petitioner's reply brief which asked the Circuit Court to so find.

10. Petitioner raised many exceptions to the Circuit Court; (1) factual acts of statutory irregularities inflicted by respondent upon petitioner which were material to the conclusion of the trial and which appears on the record to which the District Court failed or refused to include in its written opinion.

11. The Circuit Court of Appeals opinion neither gives a definitive answer

to the issues raised on appeal nor finds one way or another, and is void of any supportive precedents or case law which constitute the grounds of its action.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW CONTRAVINES ACT OF CONGRESS, 18 ST. 315 AND DISDAINS THE LONG STANDING ACCEPTED USUAL COURSE OF JUDICIAL PROCEEDINGS AS HELD BY THIS COURT IN THE E.A. PACKER SCULLY V. NEW JERSEY LITERAGE CO., (1891).

The decision below, being void of Circiut Courts findings of fact and conclusions of law breaches and impinges upon the long standing, accepted and usual course for judicial proceedings born in Chapter 77, Public Acts of the Fourty Third Congress (1875) 18 United States Statutes at Large entitled "an act to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes", requiring the circuit courts to find the facts and conclusions of law upon which it renders its judgments or decrees, and which was affirmed by this court in The

E.A. Packer Scully v. New Jersey Literage Co., (1981) 140 U.S. 360, 11 S. Ct. 794. Although this was an admiralty and maritime decision the Packer Court decided:

> "There is no practice under this statute which is peculiar to Courts of Admiralty. The rule is general that wherever the trial court finds the facts and conclusions of law therefrom it is bound to find every fact material to its conclusions, and a refusal to do so is a ground for reversal."

B. THE DECISION BELOW SHOWS RECKLESS DISREGARD

The overall undisputed facts on the record; respondent's manifest intentions toward petitioner and the negative rulings by the Courts below without subsidiary findings of facts and conclusions of law constitute a clear

state of plain and obvious error which affect the substantial constitutional rights of petitioner and if uncorrected, will be an affront to the integrity and reputation of these judicial proceedings.

As in civil litigation of this nature, the intent or state of mind of the respondent herein weighs heavily here and cannot be ignored; see 29 Am. Jur. 2d §365. p.414, in pertinent part below:

> "When one's motive, intention, malice or ill will good or bad faith, or other state of mind in doing or omitting to do certain acts becomes an issue in a civil action, his acts, statements and conduct on other occasions which have a bearing upon his state of mind upon the occasion in question are relevant and competent evidence. However, to be admissible, such col-

> lateral matters must be shown to be so connected with the matter in litigation as to make it apparent that the party to be charged had a common purpose in both. Moreover, such collateral proof must be limited to a certain period of time so that it may naturally throw light upon the state of mind of the actor in question . . ."

Where, as here, respondents being convinced that Black petitioner was mentally incompetent unto not being able to properly handle his personal affiars and insisting thus upon the District Court, assisted by independent psychiatric oral testimony and further supportive written attestations for a period of time covering all of the issues at trial; and with the opinions of the Courts below being void of findings of facts to the contrary; petitioner submits that it is factually and legally

impossible for respondent to be free from its prima facia implications herein; and free from evil intent under Title VII and Section 1981 to discipline, or terminate petitioner for failing to sign a written legal release, releasing all of his medical records.

If not for malice, how can an employee reasonably be held liable to punishment under respondent's bona fide disciplinary procedures when respondent thought him to be mentally incompetent at that time. How can petitioner reasonably be held liable for not signing a legal release when respondent thought that he had an infant-like mentality that caused respondent to surpass the normal avenues of trial advocacy and move the District Court to appoint a guardian ad litem for his own protection.

CONCLUSIONS

It is clear, from the character of the record and the undisputed facts which certain substantial constitutional rights herein denied, that the courts below have rejected the principles of righteousness and holiness and equity that are contained in the law. The Courts have so far departed from the usual course of judicial proceedings and your petitioner has been made to taste bitter drugs from the cup of affliction and has felt such harsh chilling winds of oppression that calls for a swift and certain exercise of this court's powers of supervision of this case in general, and in the foregoing specifically, being mindful of its Plain Error Rule.

Failure of this Court to review will have the effect of breaching all

of the principles of righteousness, holiness and equity as shown here and will result in irrepairable harm, both to this humble cause and to the integrity and reputation of these proceedings. Wherefore, your petitioner respectfully prays that this Court hear his cries and supplication, and issue a Writ of Certiorari to the Sixth Circuit Court of Appeals.

Respectfully Submitted,

Gary Carson

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Columbus, Ohio 43205
(614) 258-7492

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PROOF OF SERVICE

I, Gary Carson, Petitioner Pro Se, and appellant herein, hereby certify that on the 30th day of September, 1984, I served a copy of the foregoing Petition For A Writ of Certiorari, etc., to the Supreme Court on the above named defendant and appellee by depositing same in a United States Post Office with first class postage prepaid addressed to the attorney of record of said defendant and appellee at his post office address as follows:

David R. Kelleher, Esq.
100 East Broad Street
Columbus, Ohio 43215

Gary Carson
Gary Carson
Petitioner Pro Se

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FILED 2/2

JUL 31 1984

JOHN P. HEHMAN, Clerk

No. 82-3741

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GARY CARSON,

Plaintiff-Appellant,

v.

WESTERN ELECTRIC CO., INC.,

Defendant-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

EXHIBIT "A"

BEFORE: LIVELY, Chief Judge; PECK, Senior Circuit Judge; and NEESE, District Judge.*

PER CURIAM. The plaintiff appeals from judgment for the defendant in this action in which the plaintiff claimed that he had been subjected to racial discrimination in employment practices by the defendant and sought relief pursuant to Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981. Following a nine-day trial before the court, United States District Judge Robert M. Duncan entered an opinion and order in which he dealt with every aspect of the case. Judge Duncan found that the defendant employer did not subject the plaintiff to disparate treatment either by failing to protect the plaintiff from harassment, by subjecting the plaintiff to disciplinary action or, finally, by terminating the plaintiff's employment.

On appeal the plaintiff argues that the findings of fact on which the district court based its judgment for the defendant are clearly erroneous. The plaintiff also

---

*The Honorable C. G. Neese, Senior Judge, U.S. District Court for the Eastern and Middle Districts of Tennessee, sitting by designation.

argues that the findings of fact are not sufficient. Rule 52(a), Federal Rules of Civil Procedure, provides that findings of fact shall not be set aside unless clearly erroneous and that it is sufficient if findings of fact and conclusions of law appear in an opinion or memorandum of decision filed by the court. It is not necessary that the findings of fact be listed numerically and set apart from the text of a memorandum of decision or opinion. Upon consideration of the briefs of the parties and the record on appeal, oral argument having been waived, the court concludes that the findings of fact contained in the opinion of the district court are not clearly erroneous and that the conclusions of law are in accord with controlling legal principles.

Accordingly, the judgment of the district court is affirmed for the reasons set forth in the opinion and order filed by Judge Duncan on October 5, 1982.

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By _____
Deputy Clerk

ISSUED AS MANDATE: August 22, 1984
COSTS: None

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FILED
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ALEXANDER L. STEVAS,
CLERK

No. 84-906

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

GARY CARSON

v.

AMERICAN TELEPHONE AND
TELEGRAPH TECHNOLOGIES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX

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65

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Gary Carson :

Plaintiff :

v. :

Case No. C-2-77-970

Western Electric Co.: Inc., et al.,

:

Defendants

:

OPINION AND ORDER

Plaintiff brings this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq., as well as 42 U.S.C. §1981, to remedy certain acts of employment discrimination he alledgely suffered at the hands of his former employer. Specifically plaintiff claims that defendant discriminated against him by failing to protect him adequately from racial harassment on the part of fellow employees, by disciplining him in a discriminatory manner, and ultimately by

discharging him from his job. Plaintiff's former union was also included in the complaint.

The case was tried to the Court for nine days, beginning on March 1, 1982. At the close of plaintiff's case-in-chief, the Court granted the defendant union's motion to dismiss the claims against it pursuant to Rule 40(b) of the Federal Rules of Civil Procedure. Plaintiff and the remaining defendant have submitted their separate post-trial memoranda, and the case is now ripe for a decision on the merits. The Court's findings of fact and conclusions of law follow. Fed. R. Civ. P. 52(a).

I

Plaintiff Gary S. Carson is a black male, who, at the time of trial, was approximately 35 years old. Defendant Western Electric Company, Inc. is the manufacturer of various electrical com-

ponents, and it maintains a large plant in Columbus.

Carson was hired by Western Electric as a Grade 33 cableformer in 1964. His job consisted primarily of assembling large electrical cables. He worked at the Columbus plant for nearly nine years without significant incident. By November 1973 he had been promoted to Grade 35, one grade below the highest level cableforming position.

From 1973 until his discharge in the spring of 1978, however, Carson's employment at Western Electric can best be described as troubled. In March 1973 while Carson was working in the main cableforming mezzanine, John Ransom, a co-worker, alledgely directed a racial slur at him. When Carson complained about the incident, a supervisor investigated it and arranged a meeting between company officials and the two individuals involved. Ransom was

warned that if the epithets continued he could be discharged. Afterward, a memo written by the supervisor was attached to the personnel files of both Ransom and Carson. In it the supervisor suggested that Carson was as much at fault for the confrontation as was Ransom. After Carson filed a complaint with the Ohio Civil Rights Commission (OCRC) over the memo, it was removed from his file voluntarily by Western Electric.

In November 1973, the cableformers and other Western Electric employees at the plant engaged in an unauthorized wildcat strike. Carson chose not to participate in the strike, and, along with a number of others, he crossed the picket lines to work. After the strike he and many of the non-participants began to experience rather pointed harassment from the former strikers. In Carson's case, this abuse took on a decidedly racial tenor. Racially

derogatory newspaper clippings were left at his work station, as was a plastic gorilla and a wooden cross with scorch marks on it. In addition, wet shellac was placed on his chair, tools were removed from his workbench and raw eggs or banana peelings were thrown in his direction occasionally even hitting him.

At about this same time Carson was involved in an incident wherein an employee named Cuccio held the elevator doors shut so that Carson was unable to exit. Cuccio was caught in the act by supervisor Rudy Drabick, and, according to Western Electric, was given a verbal reprimand in the presence of a union representative.

Aware generally of this harassment, department chief William Morris arranged for Carson to be transferred from the main mezzanine to the "5A area" on the main floor. This area was designed to handle special orders, and only a few cable-

formers worked there. While in 5A, Carson apparently experienced little or no harassment from his fellow workers. In February of 1974, however, Morris moved Carson back to the mezzanine. Morris testified that he ordered the transfer because production quotas on the mezzanine were being increased, and because he felt that the cableformers' ill will toward Carson had simmered down sufficiently.

As soon as Carson returned to the mezzanine, though, the harassment began anew. Carson then contacted Eva Ball, an EEO representative, to complain both about his co-workers and about his supervisors' failure to do anything to protect him. Ball arranged meetings with at least two of Carson's supervisors to discuss the problem. At each of these meetings Ball was informed that little else had been done to protect Carson because the supervisors generally were unable to identify the cul-

prits, except in the case of Ransom and Cuccio.

Company officials did not totally ignore Carson's renewed problems, however. Shortly after Carson returned to the mezzanine, Morris had Carson's work station moved closer to his, so as to prevent further harassment, or at least to identify the guilty parties. Later Carson's station was moved next to the desk of his direct supervisors, and they were told by Morris to be on the lookout for individuals attempting to disturb Carson. Finally, in late May of 1974, Morris called a special meeting of all the employees in Carson's section; he angrily warned them that further harassment of Carson would not be tolerated, and that anyone caught at it would be terminated immediately. It is not clear from the record whether any of these actions had any appreciable effect on either the frequency of the severity of

abuse suffered by Carson.

During this same period Carson began to run into disciplinary problems. While working in 5A, he received one verbal warning from supervisor Jim Ratliff, all pertaining to poor quality work. In mid-February 1974, Carson received a one-day suspension without pay for his work on one particular project. According to the report filed by his supervisor, Carson had been assigned in late January to a cable-forming job that was supposed to take only four days. It took twelve days to complete the project, and when it was checked by quality control personnel they found over 900 defects in it all presumably caused by Carson. Carson filed grievances with the union and a discrimination charge with OCRC over the suspension. He apparently was not successful in getting the discipline revoked, however.

On May 2, 1974, Carson was again

disciplined, this time for being away from his work area. According to Carson's supervisor, Norman Chappelear, the discipline came during an overtime period when the cableformers were deluged with back orders. Chappelear had received a call from the wiring department complaining about the fact that a cable which had been assigned to Carson had not arrived yet. When Chappelear went to talk to Carson about the project, he could not find Carson. He testified that he waited for approximately 12 minutes before a scheduled break and for approximately 5 mintes thereafter before Carson showed up. Chappelear then gave Carson a verbal warning for being away from his work station.

Later that day, Chappelear reviewed the employee efficiency reports for the previous month and found that Carson had the lowest efficiency rating in his group. At the end of the day he gave Carson an

efficiency warning. According to Western Electric it was company policy at that time to give such a warning to the cable-former with the lowest efficiency rating for each month. Carson received a similar warning on June 10, 1974, after Chappelear had reviewed the efficiency figures for May.

Western Electric's records show that on May 13 Carson was placed on "Restriction 51" by the company's medical staff. According to a doctor in the medical department, this work restriction was designed for employees suffering from nervous disorders, and it called for supervisors to make sure that the affected employee was exposed to as little nervous tension as possible. Carson remained on this restriction until May 29.

On June 20, department chief Morris called a meeting with Carson to discuss his low efficiency rating. Also present

were Chappelear and two union stewards. At the meeting it was agreed that the two efficiency warnings Carson had received from Chappelear should be revoked because Carson had been on Restriction 51 for a portion of that time. Morris refused to void the May 2 warning for being outside the work area, however. He also told Carson that if he could not perform all that was required of him as a Grade 35 cableformer, even during the times he was on Restriction 51, then he should consider either taking a downgrade or asking the placement department to find another job within the company for him.

The next day Carson produced a medical certificate from his personal physician indicating that he had a peptic ulcer. He was given sick leave by the company's medical department, and he did not return to work until September 16, nearly three months later. During his absence he

received full pay under the company's sickness/disability benefits plan.[1]

Upon returning to the plant, Carson worked for approximately three months without serious incident. On December 19, however, he was given a verbal warning by Rudy Drabick, a plant supervisor, for poor efficiency. Drabick testified that he had observed Carson's work habits closely, and that he believed Carson's low efficiency rating stemmed from his leaving his work station to talk with friends on the phone or with other employees. Drabick also testified that he had spoken to Carson previously about the problem, and that Carson had complained about not having the proper tools. When Drabick saw to it that more tools were given to Carson, though, there was no noticeable improvement in efficiency.

On January 15, 1975, Carson was again warned by Drabick. This time the warning

was written, and it prompted a meeting between Carson, Drabick and a union representative. A memorandum was issued by Drabick in which Carson's work performance since the previous warning was deemed to be "unbelievably low"; it was noted further that he had an efficiency rating of 16% in contrast to the group average of around 75%. Carson was warned that further low efficiency could lead to additional disciplinary action, including discharge. The next day he obtained a Restriction 51 limitation from a company doctor, and several days later he left work on a sick leave, again suffering from his peptic ulcer and anxiety.

On March 20, 1975, Dr. Dudley Briggs, Western Electric's medical director, called Carson's treating physician and was informed that Carson could return to work at the end of the month. According to the records kept by the department, however, Carson appeared there on March 31, with a

note from his doctor dated March 18; it stated that Carson "should not return to work until released." Carson then left. The next day he was notified by the medical department that he should either produce a more specific medical statement extending his time off, or else return to work immediately. Carson did not produce an additional statement, and on April 2 he was examined by Dr. Briggs. Dr. Briggs determined that Carson's ulcer was not bleeding or perforated, and he concluded that Carson was able to return to work. He told Carson that he would have to come back to work unless he could produce evidence of "further differing opinion." No such evidence was offered, and on April 4 Carson was sent a telegram notifying him that he had been terminated.

In response to the discharge, Carson's union filed a grievance on his behalf. In addition, Carson filed a discrim-

ination claim with OCRC, alleging that his termination was racially motivated. Although the company initially rejected the grievance, it later reversed itself and reinstated Carson with full back pay on September 9, 1975. Charles Brumfield, Western Electric's industrial relations manager, testified that the reversal came about not because the company felt the discharge was unwarranted, but because negotiations were then under way with the union over a proposed third-party physician procedure for medical disability claims. According to Brumfield, Carson's case was the type of dispute to which this procedure would probably apply, and he feared that the union would use it as a test case in arbitration to force the company to accept the union's version of the package. As he put it: "to be quite honest, rather than have the arbitrator write the third-party routine for me, I decided

to reverse this case and write the third-party routine with the help of the Union, rather than outside parties." (Tr. VI-161.)

Upon his return to the plant, Carson was assigned to the Reclamation Area, a department which was designed primarily for employees who were under some sort of partial disability or work restriction. Workers in this department generally did odd jobs such as sorting parts, disassembling improperly manufactured products, or completing mescellaneous paper work. They were allowed to work at their own pace and were not subject to quality of efficiency standards.

Notwithstanding the relatively stress-free environment of the Reclamation Area, Carson continued to experience medical and disciplinary problems. After he had been back at the plant for only a month or so, he again left work under the company's benefits plan, this time on the basis of

a psychiatrist's finding that he was having an "adjustment reaction to adult life." He missed 29 days of work and returned in late November 1975. In February 1976, Carson allegedly suffered a back injury and was again off work on disability leave unitl mid-April.

When Carson returned to the Reclamation Area, he was, according to his supervisor there, somewhat of a problem. The supervisor, Richard Fowler, testified that Carson refused to do anv meaningful work and was constantly out of the work area, talking to or pestering other employees. Fowler gave Carson a verbal warning for his conduct on May 18, 1976, and he issued a written warning three days later when it appeared that Carson had not heeded the first one. The written warning was later reduced to verabl warning when union officials complained that they had not been properly notified of the May 18 discipline.

During the months that followed, Carson was again absent from work due to his back problems.[2]

At about this time, Western Electric closed down the Reclamation Area permanently. Shortly after Carson returned to work, he was thus assigned to his old cableforming job on the main floor of the plant. During an overtime period on August 26, 1976, Carson was observed by Charles Barnette, his acting supervisor, walking into the restroom with a newspaper under his arm just after the end of an authorized break. Barnette testified that Carson remained in the restroom for 35 to 40 minutes. When he came out, Barnette questioned him about what he was doing in there, and Carson allegedly replied that it was none of his business. Barnette then indicated to Carson that he would not be paid for the time he was in the restroom; later Barnette recommended that Carson be

suspended for three days because of his remarks.

A two-day suspension was approved the next day by Barnette's department chief. When Carson was informed of the suspension, according to Barnette, he laughed sarcastically and shook Barnett's hand, thanking Barnette for giving him two days off with full pay. Barnette explained that the suspension was without pay, but Carson assured him that he would be paid eventually. Sometime later Carson filed a charge with OCRC over the matter, but it is not clear from the record whether the dispute was ever resolved.

From August 31, to September 14, 1976, Carson was off work under the benefits plan for "ulcer disease." Shortly thereafter he again left work for approximately four months; the company's records indicate that this latter absence was due to "adjustment reaction to adult life--paranoid personal-

ity." Carson returned in January 1977 and worked until May of that year, with the exception of 20 days he spent on sick leave for back problems.

On May 13, 1977, Dr. Briggs received a letter from Dr. Evan Halas, Carson's personal psychiatrist. Halas noted that Carson had not been taking his medication lately and that he had kept his appointments with Halas only sporadically. Halas wrote further:

> Recently his persecutory ideas became so strong that he felt that he should retaliate and violence was very much on his mind. I feel that we are dealing here with more than just a paranoid personality disorder or an adjustment reaction to a work situation. I strongly feel that he is potentially dangerous, that he is suffering from a schizophrenic disorder of paranoid nature and I would recommend that you would take all the precautionary measures as far as his fellow workers are concerned and also to consider him strongly as a candidate for disability retirement based upon mental illness.

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Dr. Briggs apparently disagreed with this diagnosis, and the matter was referred to Dr. H.J. Leuchter pursuant to the third-party doctor procedure then in effect. Leuchter overruled Briggs, writing that:

> Mr. Carson is disabled. It is conceivable that he may have been able to perform marginally for short periods of time during the last 3 years. His basic character structure may be described as passive aggressive, characterized by both passivity and aggressiveness expressed passively by obstructionism, procrastination, intentional inefficiency or stubbornness. He is too insecure to express anger more directly and frequently projects anger on others mostly persons in authority. Slight stress tends to produce a decompensation into a paranoid personality characterized by hypersensitivity, rigidity, unwarranted suspicion, jealousy, envy, a tendency to blame others and ascribe even motives to them.

On the basis of these findings, Western Electric granted Carson a disability leave, effective retroactively from May 9, 1977. Under the terms of the benefit

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plan which governed such leaves, Carson was entitled to receive full pay for the first six months of his absence and half-pay for another six months.

On December 15, 1977, approximately one month after he had dropped to half-pay under the benefits plan, Carson commenced this lawsuit. A few days later, he appeared at the company's medical department asking to be reinstated. In support of this request he presented a letter from Dr. Halas stating that his condition had improved to the point where he was now able to work effectively again.

In light of Dr. Halas' findings several months earlier, Dr. Briggs felt that some follow-up was necessary before allowing Carson to come back to work. Briggs called Halas a few days later to inquire as to the basis for the new diagnosis. Halas told him that he had seen Carson only a few times since May, and that Car-

son, to the best of his knowledge been attending therapy sessions at the Columbus Mental Health Clinic (CMHC). Halas followed up the conversation with a letter dated January 12, 1978. In it he indicated that his recommendation of December 9 was based in part upon Carson's expressed desire to return to work. He also noted that Carson should be required to attend more therapy sessions at CMHC as a "mandatory" condition of his re-employment at the plant.

Briggs contacted Carson to obtain permission from him to examine his medical records from CMHC. According to Briggs, Carson agreed at first but later changed his mind. Through counsel, Briggs then attempted to procure the records from Carson's trial attorney. These efforts were fruitless. Briggs also tried to have Carson examined by Western Electric's corporate psychiatrist from New York, Dr.

Howard Hess. An interview with Carson was arranged, but had weather forced its cancellation.[3]

Finally, Briggs asked Carson to see Dr. Leuchter again so that Leuchter could help him in determining Carson's fitness for work. Carson refused. Western Electric's trial attorney then informed Carson's lawyer, who was later replaced by present counsel, that unless further medical information was forthcoming, Carson would be terminated pursuant to company policy when his benefits ran out in May. The attorney for Western Electric testified that at this point he and opposing counsel agreed to have Dr. Leuchter resolve the matter. According to him, Carson was to be examined by Leuchter, and Leuchter's findings would be binding on both sides.

On March 30, 1978, Carson visited Dr. Leuchter. After the examination, however, Carson hand-delivered a note to Leuchter's

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office forbidding him to release any information regarding the interview to anyone. Leuchter thereupon refused to turn over his findings, and when defense counsel objected, Carson's attorney proposed that Carson be examined by a psychiatrist of his own choosing, Dr. Korb, who would then release to Western Electric both Dr. Leuchter's findings and his own. According to the testimony of defense counsel, he agreed to this proposal on the condition that Korb's report would not be binding, and that it would be submitted to the company along with Dr. Leuchter's analysis no later than May 5, 1978. Carson was examined by Korb on May 4, but due to confusion among counsel over who was supposed to supply Leuchter's report to Korb, Korb's findings, which were inconclusive, were not submitted to Western Electric until June 19. Leuchter's report was never turned over.

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Meanwhile, Briggs met with an authorized delegate of the Columbus Area Benefits Committee (CABC), the body responsible for determining whether disabled employees should be terminated. Based on the available medical data, Briggs reported that in his opinion Carson's illness was chronic and the prognosis for his eventual return to work was poor. Under Western Electric's benefit plan, it was customary for an employee with less than 15 years of service to be terminated when his sickness disability benefits expired and it appeared that his disability would continue indefinitely. The CABC delegate therefore recommended Carson's termination, and on May 14, 1978, this recommendation was accepted by the full committee. Carson was informed of the decision a few days later. At that time he was also informed that he might be eligible to receive long-term disability benefits under the company's disability

insurance policy. Carson declined to apply for such benefits, and shortly thereafter he amended his complaint in the instant litigation, charging that his termination was recially motivated. In turn Western Electric filed a counterclaim for damages it suffered as a result of Carson's failure to abide by the agreement he allegedly made to have the matter of his return to work resolved by Dr. Leuchter.

II

It has long been the rule that a plaintiff claiming disparate treatment on account of race must prove "by a preponderance of the evidence that the defendants intentionally discriminated against (him or her)." Grano v. Dept. of Development, 637 F.2d 1073, 1081 (6th Cir. 1980). See also, Teamsters v. United States, 431, U.S. 324, 335-36 n.15 (1977); Carter v. Perry, No. C-2-77-89, Opinion and Order (S.D. Ohio, June 29, 1982) (Duncan, J.). As the Sixth Circuit has observed:

> A disparate trestment theory is very different from (a) disparate impact theory. A Title

> VII case alleging disparate treatment simply states that the defendant failed to hire or failed to promote (or otherwise treated a person differently) because of his or her race, religion, national origin or sex. The reason why the employer acted as he did is crucial. Where a Title VII case is brought under the disparate treatment theory, the plaintiff must prove discriminatory intent.

Grano, 637 F.2d at 1081.

Proving discriminatory intent by direct evidence is an onerous task, however, and it is incumbent upon the Court to analyze the charges in light of all the surrounding facts and circumstances. Id. at n.7. To facilitate this process, the Supreme Court has developed a tripartite allocation of the burden of proof in all disparate treatment cases:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to

> articulate some legitimate, non-discriminatory reason for the employee's rejection." [McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)]. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by the preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-253 (1981).[4]

Where, as here, the alleged discrimination arises in the course of plaintiff's employment, a prima facie case can be established simply by showing "that [plaintiff] is a member of a class entitled to the protection of Title VII, and that he [or she] is accorded treatment different from that accorded persons otherwise similarly situated who are not members of the class." Potter v. Goodwill Industries of Cleveland, 528 F.2d 964, 965 (6th Cir. 1975); Hall v. Ledex, No. 80-3588, slip

op. at 3 (6th Cir. Jan. 15, 1982); Carter v. Petry, supra, at 3. A prima facie showing raises the presumption of intentional discrimination. See Burdine, 450 U.S. at 254; Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

Once a prima facie case has been established, it is up to the defendant to introduce evidence showing there was a legitimate, nondiscriminatory reason for the disparity. Burdine, 450 U.S. at 253. This prong of the Burdine calculus is not as demanding as it might seem at first blush, however, for:

> [t]he defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. . . . If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity . . . .

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450 U.S. at 255.

At this third level of inquiry, the plaintiff must show that the legitimate reason articulated by defendant is mere pretext for a more invidious motivation. As the Court explained in Burdine:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See McDonnell Douglas, 411 U,S, at 304-205.

450 U.S. at 256; see also Hall, supra, at 3; Carter, supra, at 3.

In the present case, Carson's allegations can be divided into three general

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groupings. He claims first that the company failed to afford him adequate protection from the racial harassment directed at him by his co-workers. Second he contends that much, if not all, of the disciplinary action taken against him by various supervisors was discriminatorily motivated. Finally he argues that the company's refusal to accept him back at work in the spring of 1978, and its recommendation to CABC that he be terminated both amount to unlawful discrimination. The Court must therefore examine each of these aspects of his job separately to determine whether or not he has met the burdens of proof imposed on him by McDonnell Douglas and Burdine.

III

A. Failure to Protect from Harassment

There is no question that Carson suffered real and rather prolonged harassment by fellow cableformers in late 1973 and early 1974. Though much of the abuse

appears to have been generated by Carson's non-participation in the strike action of November 1973, it was distinctly racial in character. Carson does not seek to hold the company legally responsible for each and every incident of racial abuse directed at him, but he contends that Western Electric treated him less favorably than white strikebreakers who experienced similar types of harassment from those who had supported the strike.

Oridnarily an employer is not accountable under Title VII or 42 U.S.C. §1981 for individual acts of discrimination engaged in by non-supervisory personnel. Crocker v. Boeing Co. (Veritol Div.), 437 F. Supp. 1138, 1191-92 (E.D. Pa. 1977); Howard v. NCR Corp., 388 F. Supp. 1177 (S.D. Pa. 1977). Where management is aware of the problem, however, it may be found to have tacitly condoned the invidious discrimination if it failed to investigate

alleged harassment adequately or if it refused to take reasonable steps to protect the victims against future abuse. DeGrace v. Rumsfield, 614 F. 2d 796, 803-804 (1st Cir. 1980); United States v. City of Buffalo, 457 F. Supp. 612, 631-631 (W.D. N.Y. 1978). A Title VII plaintiff may thus establish a prima facie case under Burdine and McDonnell Douglas if he or she can show that the company's response to incidents of classbased harassment was somehow less favorable than its response to abuse or harassment that was not class-based.[5]

At trial Carson produced evidence to show that two white co-workers who were also being harassed for non-participation in the wildcat strike, Rita Jessup and Shirley Brewer, were permanently transferred away from the cableforming mezzanine to another part of the plant in order to protect them from further abuse. Carson, however, was transferred to Department 5A

from the mezzanine for only eight to ten weeks. It thus appears that Carson was treated somewhat differently in this respect than were similarly situated white employees.

In rebuttal the company produced evidence establishing that both Jessup and Brewer were cable inspectors, not cableformers. As such, according to the company, they could be moved around to various parts of the plant without difficulty, whereas Grade 35 cableformers were needed only on the mezzanine in February 1974 and thereafter. Carson allegedly could not be transferred elsewhere in the plant without being given another, presumably less attractive job.

Western Electric has thus articulated a ligitimate, non-discriminatory reason for the apparent disparity in treatment accorded Carson vis a vis Jessup and Brewer. Carson, moreover, has failed to convince the Court that this articulated reason is

is pretextual. There is no evidence that Morris' decision to transfer Carson back to the mezzanine was motivated by anything other than the fact that Carson was needed there due to increased production quotas. Morris' belief that Carson would not be harassed further upon reassignment to the mezzanine may have been naive, but there is no indication that it was held in bad faith or with malice toward Carson. In this aspect of the case, then, Carson has not met his burden of proof.

Carson also argues that the company generally could have taken greater steps to protect him, or at least to discipline those who were persecuting him. As an example, he points to the rather ambivalent memo written by his supervisor in 1973 after he complained about a racial slur from John Ransom. Concededly this memo, as well as Morris' premature reassignment of Carson to the mezzanine in 1974, reflect

some insensitivity on the part of individual supervisors to Carson's predicament, but on the whole the Court cannot say that the company's response to the problem was inadequate as a matter of law. The company clearly did not take every conceivable step possible in dealing with Carson's harassment, but it was not required by law to do so. Title VII and §1981 require only that the company take remedial measures that are reasonable in light of all the circumstances. Id. Under the circumstances presented here, this requirement appears to have been met. The company took affirmative disciplinary action against the two employees it actually caught harassing Carson, and on several occasions supervisory personnel made it clear to the rest of the cable-formers that further abuse would not be tolerated. In addition, Carson, while on the mezzanine, was moved around several times to allow his supervisors to monitor

the situation more closely, and there is little to indicate that they took their responsibilities with respect to his protection less than seriously. The Court therefore finds that Western Electric did not breach its duty under Title VII or §1981 to guard against class-based harassment of Carson. This part of his complaint is without merit.

B.. Disciplinary Action

With respect to the many warnings, disciplinary memos, and suspensions to which he was a party, Carson makes a number of charges. He claims first that much of the disciplinary action taken against him was in retaliation for the charges of discrimination he filed with OCRC. He alleges further that department chief Morirs plotted to "build a record" against him, hoping that it would ultimately lead to his discharge. As evidence he testified that another employee, Richard Kearny, had told

him in 1975 that Morris was "out to get" him.

The Court finds Carson's allegations to be unfounded. Aside from his own testimony, based in part on hearsay, there is no evidence whatsoever that Morris or any of the other supervisors ever had a retaliatory motive in disciplining Carson. Most of them testified that they were not even aware at the time they supervised Carson that he had charges pending with OCRC. Carson's testimony on this point is suspect, moreover. At trial the company produced Carson's alleged source, Kearny, who testified that he had never had any discussions with Morris about Carson or with Carson about Morris' attitude toward him. It is possible that Morris and some of the other supervisors may have been more careful to document disciplinary actions taken against Carson because of his demonstrated propensity to appeal them, but there is nothing

to suggest that the actions themselves were retaliatory.

Carson also claims that the disciplines he received after May 1974 were unwarranted in light of his nervous condition and the work restriction he was under. He acknowledges that there were white employees at the plant who received disciplinary actions similar to his for low efficiency or being outside of the proper work area, but he charges that "Western Electric failed to show, or prove, that [even] one of the disciplined white employees had received Restruction 51 . . . from Western Electric's medical department personnel." Plaintiff's Proposed Findings and Conclusions at 6.

This argument is seriously flawed. Under McDonnell Douglas and its progeny, the burden of coming forward with evidence of disparate treatment is on the plaintiff not the defendant. If Carson is to prevail on this charge, it is therefore up to him

to produce evidence to show that he was treated differently than white employees who were under similar medical conditions and/or work restrictions. He has not produced any such evidence. Indeed, the evidence suggests that although the company was willing to revoke the low efficiency warnings Carson received in May and June or 1974, it did not generally reduce its efficiency expectations for regular cableformers on Restriction 51, nor were such workers allowed to take longer break periods than the others.[6] There is thus no indication at all that Carson was treated any differently than others who were similarly affected.

Carson next takes issue with various specific incidents of disciplinary action. He claims, for instance, that the verbal warning given to him by supervisor Chappelear in 1974 for being out of the break area was discriminatory because neither

Western Electric nor the cableforming department "had a policy or standard . . . outlining what constituted a reasonable period of time that an employee could be away from his job during the time he was to perform assigned duties." Plaintiff's Proposed Findings and Conclusions at 5. Even if true, this allegation falls short of making out a Title VII claim. The focus in Title VII disparate treatment litigation is not company policies or procedures, but rather on how the claimant was treated in relation to non-minority co-workers. See e. g., Dhamani v. Flxible Co,. No. C-2-77-1007, Opinion and Order at 16 (S.D. Ohio, Aug. 2, 1982) (Duncan, J.). Carson has simply failed to show that the verbal warning he received from Chappelear was in any sense more harsh than the discipline given other employees for similar infractions. In fact, Western Electric has produced the names of at least three white

employees who received the same type of discipline for being away from their work areas or otherwise not working.

Carson also protests the two-day suspension he received from supervisor Barnette in August 1976 for reading a newspaper in the restroom. Carson contends that the suspension was unduly harsh, and that it was more severe punishment than that which he would have received had he been white. In support he offered the uncorroborated testimony of a fellow worker who witnessed the incident, and who testified that white employees often used the restroom for more than a half-hour without being disciplined.

Notwithstanding this testimony, the Court finds that Carson has not established a prima facie case on this issue. Western Electric has produced verified records showing that at least three white employees were similarly disciplined for loitering or

taking unauthorized breaks during 1976. It thus appears the Carson was treated no differently than his white co-workers, at least not with respect to this particular incident. The Court believes, moreover, that the discipline was fully justified in light of the fact that the violation occurred during an overtime period for which Carson was receiving higher pay, and in light of Carson's rather belligerent behavior toward Barnette when confronted by him.

Lastly, with respect to the discipline Carson received in 1975 from supervisor Drabick for poor work efficiency, Carson contends that he was "set up" by Drabick. As proof he produced a white cable inspector, William Ralph, who testified that Drabick had ordered him on at least one occasion to check Carson's work against a production order that had been amended after Carson completed the job, thereby

inflating the number of erros attributable to Carson, Ralph also testified that Drabick had him check Carson's work at least once or twice a day, much more often than was normal for other workers.

If true, this testimony would go far in establishing a prima facie case for Carson. The Court has serious doubts about Ralph's veracity, however, On cross-examination it was established that Ralph was somewhat of a disciplinary problem himself, having incurred a number of disciplinary actions for poor work application. Ralph also testified that he has several workers' compensation claims currently pending against the company, and that he and Drabick had had at least one "run-in" while Ralph was employed at the plant. It thus seems that Ralph has a bit of an axe to grind against both Drabick and Western Electric, and based on its own observation of Ralph's demeanor at trial, the Court

chooses to attach little significance to his testimony.

Even if Ralph was wholly credible, his testimony alone would not be sufficient to support Carson's claim of recial discrimination. Ralph testified on direct examination that he himself had been "set up" by Drabick sometime after the Carson episode. This suggests that the alleged abuse by Drabick if it occurred at all, was motivated more by contempt for slow or disobedient employees in general than by animosity toward black workers or Carson in particular. As has been noted above, the plaintiff in a Title VII case bears the ultimate burden of proving intentional discrimination on the part of his employer, or at least his immediate superiors. With respect to Drabick, Carson has not accomplished this admittedly difficult task.

The remainder of Carson's discipline-related claims are likewise without merit.

It is clear that Carson was disciplined by his supervisors more often than most white employees at the plant; it also appears that these supervisors were at times less sympathetic to Carson's personal problems than might be desired. The Court can find no instance on the record in which the discipline received by Carson was undeserved, however. Additionally, the Court is convinced, after having had ample opportunity to observe Carson on the stand and throughout the course of this litigation, that many of his problems with the supervisory staff were exacerbated, if not caused *in toto*, by his own intransigence and refusal to accept responsibility for poor job performance. Perhaps Carson's misconceptions stemmed in turn from the emotional disorders he was suffering from during these years, but there is little evidence that the discipline he received was racially motivated.

C. Termination

In his third group of claims, Carson contends generally that the decision to terminate him and to deny him long-term disability benefits or a disability leave of absence was discriminatory in nature. To support this charge, he relies on a number of individual events leading up to the discharge. He points first to Dr. Briggs' initial refusal in late 1977 to approve his return to work without further medical records, particularly those pertaining to his treatment at CMHC. At trial he produced evidence to show that two white employees with disabling psychological problems had been allowed to return to work at the plant without having to produce such extensive documentation of their prior treatment.

At first it would appear that Carson has established at least a prima facie case on this aspect of the suit. Upon closer scrutiny, however, the evidence reveals

that the circumstances surrounding each of the cases relied upon by Carson were markedly different from his own. Briggs testified that he had allowed one of the white employees, Ralph Stevens, to return to work simply upon the recommendation of Steven's personal psychiatrist because Stevens suffered from a mental disorder which was significantly less severe than that suffered by Carson. As to the other white employee, Frank Decker, Briggs testified that he had in fact required Decker to sign releases giving Briggs permission to obtain all of his medical records. These releases were produced at trial. Briggs also said that he allowed Decker to return to work because he felt sure from his own observation and treatment of Decker that he knew the precise nature of the malady and the treatment which would be required for it.

The Court finds Briggs' testimony on this point entirely credible. Insofar as

his initial refusal to reinstate Carson is concerned, any difference which may have occurred between his handling of the Carson case as compared to those of white coworkers appears from the preponderance of the evidence to have resulted not from racial animus but rather from the legitimate difference in the cases themselves. Briggs' decision to condition Carson's return on the production of further medical records, moreover, seems eminently reasonable in light of Dr. Halas' rather abrupt seemingly unsupported change in diagnosis. The Court thus believes that Briggs' actions with respect to Carson in late 1977 and early 1978 were taken for the most part in the exercise of his best professional judgment, not for discriminatory purposes.

As further evidence of the alleged discrimination, Carson points to the company's failure to employ the third-party physician procedure in early 1978. Accord-

ing to Carson, Western Electric, by circumventing this procedure, "was able to have the questions of plaintiff's ability to return to work placed in the hands of attorneys at law. Such a maneuver was contra to the intent and purpose of the [procedure] and against past practice." Plaintiff's Proposed Findings and Conclusions at 10.

This argument merits scant attention. In the first place, the company presented evidence to show that the collective bargaining agreement then in effect provided for use of the third-party physician procedure only when an employee's physician felt that the employee could not work, not necessarily when the private physician felt he could work after a prolonged absence. Carson cited no instance in which the procedure had been used in dispute of this latter kind. Second, even if such a procedure had been used previously, the company

ultimately did offer to be bound by the findings of Dr. Leuchter--the same "neutral" physician who had overruled Briggs several months earlier. Ideally, perhaps, this offer could have been made before the lawyers for each side became involved, but the fact that it was not advanced earlier does not necessarily support a finding of racial discrimination.

Carson also attaches great significance to the fact that of the four Western Electric employees to go before the CABC on May 18, 1978--three of whom were white--only he was terminated without a disability leave. Like Carson, each of the three white employees had come to the end of their benefits eligibility period under Western Electric's company plan. Unlike Carson, though, each received some form of disability leave which would have enabled them to return to work upon becoming fit to do so.

The company offered legitimate excuses

for this apparent disparity. It established that in contrast to Carson, two of the white employees had disabilities stemming from job-related injuries. Under company policy employees suffering from injuries allegedly incurred on the job were not ordinarily terminated, at least not until their workers' compensation claims were resolved. As to the third white employee, a Ms. Mowery, it was explained that while she did not have a job-related disability, she was under "severe emotional trauma," and that "closing her out at that time would have had a detrimental effect on her recovery." Defendant's Proposed Findings and Conclusions at 33. Alternatively, the company points out that of the four employees under review, the three that were granted extended benefits all had favorable recommendations from Dr. Briggs. Because of Carson's refusal to cooperate with Briggs in turning over his medical records, however, Carson

did not receive such a recommendation.

Western Electric's distinction between Carson and Ms. Mowery is somewhat curious, for it seems from the record that Carson too was under "severe emotional trauma," and that his termination might also have had a "detrimental effect" on the chances for his recovery. The evidence suggests that the real reason for Carson's termination by CABC was that Briggs recommended it. His motivations in reporting on Carson's case as he did thus lies at the heart of Carsons's allegations.

As has been noted above, the Court generally finds Briggs' testimony to be worthy of belief. His actions with respect to the Carson matter are not wholly above reproach, of course, for he, like Dr. Halas, apparently changed his medical opinion regarding Carson rather drastically within the space of a few months. It is possible, moreover, that Briggs was somewhat irri-

tated either with Carson personally or with the fact that Carson had succeeded in obtaining a disability leave over his objections in May 1977. Nonetheless, based on its assessment of Briggs' demeanor at trial, the Court believes that his recommendation on Carson to CABC was made in good faith and without a discriminatory motivation. Since Carson had refused to produce his records from CMHC or submit to further psychological examinations, Briggs had no basis upon which to doubt his impression that Carson was yet unfit to return to work. Briggs thus had little choice but to report to CABC that Carson was still disabled, and that the prognosis for his recovery was uncertain. The Court therefore concludes that neither Briggs' recommendations nor the CABC action taken thereon were discriminatory.

In this and every other aspect, then, Carson has either failed to make out a

prima facie case under McDonnell Douglas and Burdine, or has failed to rebut the legitimate explanations offered by the company for any apparent difference in its treatment of Carson as opposed to non-minority employees. The Court is not unsympathetic to Carson's charges, however. As was noted above, Carson was in fact the object of rather severe racial harassment from fellow cableformers for his refusal to participate in the wildcat strike of 1973, and this abuse may well have triggered or at least exacerbated some of the psychological problems which Carson experienced later. The Court, moreover, has no doubt that Carson sincerely believes he has been discriminated against by the company and its management corps. Unfortunately for him, the proof offered at trial falls very short of satisfying the increasingly heavy burdens imposed upon Title VII claimants. The Court must therefore find

against Carson on each of his claims.

IV

This leaves only Western Electric's counterclaim for breach of contract. The company contends that Carson, through his attorney, entered into a valid and enforceable agreement to have the dispute between Dr. Briggs and Halas over his return to work resolved by a neutral third physician, Dr. Leuchter. Breach of this agreement, according to the company, resulted in its having to "expend attorneys' fees, costs and other expenses it would not have otherwise had to expend, in order to defend against plaintiff's claim" of discriminatory termination. Defendant' Proposed Findings and Conclusions at 36. The precise amount of damages allegedly suffered by Western Electric is not specified.

This counterclaim necessarily fails for want of proof. At best the terms of the so-called contract were extremely

fuzzy. Although defense counsel testified that he and Carson's former attorney entered orally into a firm agreement to have Carson examined by Leuchter and to be bound by the findings, neither the correspondence which followed the agreement nor the deposition testimony of the other attorney corroborates defense counsel's recollection of the "firmness" of the deal. Furthermore, there is no indication on the record that Carson's attorney had actual or implied authority to enter into an agreement of this kind on Carson's behalf. Even if he did, it is not clear that Western Electric was ever injured by the supposed breach. The company's allegations of injury are implicitly premised on the notion that Leuchter's findings would have supported those of Briggs. Carson's actions subsequent to the examination suggest that this might have been so, but since the findings were never released, their content is

purely a matter of speculation. Western Electric has thus failed to carry its burden of proof, both with respect to the existence of a valid, binding agreement and with respect to a cognizable injury.

V

For these reasons the Court finds in favor of defendant on all of the claims stated in the complaint and in favor of plaintiff on defendant's counterclaim. There being no further claims on the record, the case is DISMISSED. The Clerk shall enter judgment accordingly.

So ORDERED.

Robert M. Duncan, Judge
United States District Court

1 Under this plan, an employee with Carson's seniority would receive full pay for the first 13 weeks of his disability. Thereafter, benefits dropped to half-pay for another 39 weeks. Carson thus returned to work in September 1974, shortly before his benefits would have been cut in half under the plan.

2 Company records show that Carson was on disability leave for his back ailment between April 28 and June 28, 1976. This of course is inconsistent with Fowler's testimony that Carson was at work in May 1976. The company has offered no explanation for this discrepancy, but the Court surmises that the entry in Carson's medical records for April 28, 1976, is in error. The next entry shows that Carson was absent with back problems from June 18 through June 28, 1976.

BEST AVA

3 Dr. Hess did have the opportunity to review Carson's medical file and to talk with Carson's brother, who also worked at Western Electric. On the basis of these contacts alone, Hess wrote a letter to Briggs on February 3, 1978, stating that Carson probably suffered from paranoid schizophrenia, and that "it would be in the best interests of Gary Carson and the Columbus Works if he was considered to be totally and permanently disabled." The Court finds it difficult to believe that such a diagnosis could be properly made without ever having seen or talked to the patient. For these reasons the Court accords Dr. Hess' findings little weight.

4 Although Burdine and McDonnell Douglas both dealt specifically with claims brought under Title VII, the same general analysis applies to §1981 actions. See Long v. Ford Motor Co., 496 F.2d 500, n.11 (6th Cir.

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1974); see also, General Building Contractors Assoc., Inc. v. Pennsylvania, 50 U.S.L.W. 4975 (1982).

5 This is not the only way that a litigant may prove a Title VII claim based on co-worker harassment. Since this type of claim inherently focuses on what the employer failed to do, the proof may not always be susceptible to measurement by way of the framework laid down in Burdine and McDonnell Douglas. Because other workers at Western Electric were subjected to non-racial harassment at about the same time that Carson was, however, use of the Burdine formula is appropriate here.

6 According to the company, Restriction 51 was defined as follows:

> No nervous tension, prohibits employee from working on a job at which he must extend himself considerably and exert intense effort to maintain prop-

> er speed, precision, quality, or other pressures such as a key person on conveyer line [sic], certain types of adjusting and assembly operations where the time element is figured closely.

Tr. V at 73-74. Supervisor Morris testified that Carson was not a "key person" on a conveyor operation, and that he did not do any of the "assembly" or "adjustment" work envisioned by the abovequoted language.

Respectfully Submitted,

Gary Carson

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CERTIFICATION

Copies of the foregoing have this 18th day of December, 1984, been forwarded too all parties of record, by regular mail.

Office - Supreme Court, U.S.
FILED
NOV 8 1984
ALEXANDER L. STEVAS,
CLERK

84-906 (3)
No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

GARY CARSON

v.

AT&T TECHNOLOGIES, INC.
(FORMERLY WESTERN ELECTRIC COMPANY, INC.)

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

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24 pp

QUESTION PRESENTED

I. Is the Court of Appeals required, n the exercise of its appellate jurisdiction, o issue findings of fact and conclusions f law.

Pursuant to Rule 28.1 AT&T Technologies, Inc.'s parent corporation is American Telephone and Telegraph Company and its subsidiary is Bell Telephone Laboratories, Inc.

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OPINIONS BELOW

The order and opinion of the United States District Court for the Southern District of Ohio, containing the trial court's findings of fact and conclusions of law, and the per curiam decision of the United States Court of Appeals for the Sixth Circuit, from which petitioner seeks this Court's review, are reproduced in the attached appendix.

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the jurisdiction of the Court pursuant to 28 U.S.C. § 1254 (1966) for review by writ of certiorari of the final judgment and order of the United States Court of Appeals for the Sixth Circuit issued on July 31, 1984. Petitioner served his Petition for Writ of Certiorari on September 30, 1984 by United States mail.

Rule 36 Federal Rules of Appellate Procedure:

> The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

Rule 52(a) Federal Rules of Civil Procedure:

> (a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall

Rule 52(a) Continued

not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 17(.1) Supreme Court Rules

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict

Rule 17(.1) Continued

> with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Act of Feb. 16, 1875, ch. 77 § 1, 18 Stat. 315, repealed by Schedule of Laws Repealed, 63 Stat. 109, ch. 139 § 141 (May 29, 1949):

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the circuit courts of the United States, in deciding causes of admiralty and maritime jurisdiction

Act of Feb. 16, 1875 Continued

on the instance-side of the court, shall find the facts and the conclusions of law upon which it renders its judgments or decrees, and shall state the facts and conclusions of law separately. And in finding the facts, as provided, said court may, upon the consent of the parties who shall have appeared and put any matter of fact in issue, and subject to such general rules in the premises as shall be made and provided from time to time, impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issues of fact in such cause, under the direction of the court, as in cases at common law. And the finding of such jury, unless set aside for lawful cause, shall be entered of record, and stand as the finding of the court, upon which judgment shall be entered according to law. The review of the judgments and decrees entered upon such findings by the Supreme Court, upon appeal, shall be limited to a determination of the questions of law arising upon the record, and to such rulings of the circuit court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law.

Act of March 3, 1876, ch. 137, § 1, 18 Stat. 470:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects; and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court.

Act of March 3, 1876 Continued

> And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided; nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law.

STATEMENT OF THE CASE

Petitioner Gary Carson, ("Carson"), formerly employed by Respondent, AT&T Technologies, Inc. ("the Company") instituted this action on December 15, 1977 pursuant to Title VII of the Civil Rights Act of 1964, as amended, Title 52 U.S.C. § 2000e et seq. The action was tried before the United States District Court for the Southern District of Ohio for nine days beginning on March 1, 1982. Throughout the entire proceedings in the district court Mr. Carson was represented by counsel experienced in litigating discrimination actions under Title VII. See Opinion of the District Court at 11-12, attached in the Appendix hereto.

The District Court issued a thirty page opinion making detailed findings of fact and conclusions of law in holding that the Company did not discriminate against the petitioner because of his race.

In a per curiam decision issued July 31, 1984, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's judgment by concluding that the District Court's findings of fact "are not clearly erroneous and that the conclusions of law are in accordance with controlling legal principles." It is from this order that petitioner seeks review.

ARGUMENT

The Petition For A Writ of Certiorari Should Not Be Granted Because Federal Law Does Not Require The Courts Of Appeals To State Findings Of Facts Or Conclusions Of Law In The Exercise Of Their Appellate Jurisdiction.

Petitioner seeks review on the basis that the United States Court of Appeals for the Sixth Circuit failed to separately state findings of fact and conclusions of law by essentially arguing that the appellate court has departed from the accepted and usual course of judicial proceedings contrary to federal law. The petitioner's argument is without merit and does not constitute a special or important reason, pursuant to Rule 17 of the Rules of the Supreme Court, why this Court should exercise its discretion and grant review because: 1) there is no duty in law requiring a court of appeals to make findings of fact and conclusions

of law, but rather, the appellate court's function is to review the trial court's findings of fact and conclusions of law; and 2) the accepted and usual practice in appellate proceedings, as supported by this Court in the interest of judicial economy, does not require any written opinion in any case reviewed.[1]

In fact, the statute cited by the petitioner for the proposition that circuit courts must make findings of fact and conclusions of law applied only to courts of admiralty and maritime jurisdiction,

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[1]Petitioner does not present a federal question about which there is a conflict among federal courts of appeals, among state courts of last resort, or between a federal court of appeals and a state court of last resort. R.S.Ct. 17(.1)(a) and (.1)(b). Nor does petitioner present an important question of federal law which this Court has not decided. R.S.Ct. 17(.1)(c). In fact, petitioner has failed to raise any reason why the court of appeals improperly affirmed the decision of the district court or why the district court erred.

and it has been repealed. See Act of Feb. 16, 1875 ch. 77, § 1, 18 Stat. 315, repealed by Schedule of Laws Repealed, 63 Stat. 109, ch. 139, § 141 (May 29, 1949). E.A. Packer v. New Jersey Lighterage Co., 140 U.S. 360 (1891) is also inapposite because it relies on the repealed statute cited by petitioner and because, unlike the present case, it involved this Court's review of a trial court's decision. See Act of March 3, 1825, ch. 137, § 1, 18 Stat. 470. The case did not address the issue of whether an appellate court must make findings of fact and conclusions of law.

Neither statutory nor common law requires a court of appeals to make findings of fact and conclusions of law and the Federal Rules of Appellate Procedure expressly contemplate that appellate courts may render judgments without writing an opinion. Furman v. United States, 720 F.2d 263, 264 (2d Cir. 1983).

Rule 36 provides in pertinent part:

> The notations of a judgment in the docket constitutes entry of the judgment.... If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment. (Emphasis added).

It is not the function of an appellate court to conduct a trial de novo, but rather, it is only required to review the decision of the trial court to ensure that the findings of fact are not clearly erroneous and that the decision is in accord with applicable law. Securities and Exchange Commission v. Chenery, 318 U.S. 80, 88 (1943); Kelley v. Everglades Drainage District, 319 U.S. 415, 421-22 (1943). For example, Rule 52(a) of the Federal Rules of Civil Procedure provides that "[i]n all actions tried upon the facts without a jury... the court shall

find the facts specially and state separately its conclusions of law [and]...findings of fact should not be set aside unless clearly erroneous." Once a court of appeals determines that the trial court's findings are not clearly erroneous it would be an absurd and totally inefficient use of judicial resources to require it to state separately its own findings of fact and conclusions of law.

This Court has stated "we, of course, agree that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmations." Taylor v. McKeithen, 407 U.S. 191, 194 n.4 (1972); See also United States v. Baynes, 548 F.2d 481 (3d Cir. 1977). In fact, summary affirmations are encouraged when appropriate, for the purpose of easing the overloaded dockets of the courts of appeals. NLRB v.

Amalgamated Clothing Workers of America AFL-CIO, Local 990, 430 F.2d 966 (5th Cir. 1970). In Amalgamated Clothing Workers, supra, the Court held:

> From the standpoint of the function of an appellate court opinion, little is to be served by an elaborate discussion at all on the underlying facts which the court, after mature study are not demonstrated to be clearly erroneous under F.R.Civ.P. 52(a). Id. at 971.

The present case is substantially similar to Furman v. United States, supra, in which petitioner for a writ of habeas corpus argued that the court of appeals in his original appeal erred because it affirmed his conviction summarily. In holding that this argument was without merit, the court stated that summary orders are needed to preserve judicial time for cases that raise new or significant issues and to limit the number of published opinions which must be reviewed by other judges and lawyers. Preparation

of formal opinions "would place a substantial counterproductive burden on the court." Id. at 266.

In the present case, the court of appeals affirmed the decision of the district court and the petitioner has not alleged that the court of appeals failed to give adequate consideration to his claims on appeal. It is the trial court's findings, therefore, that remain dispositive of petitioner's claims of racial discrimination regardless of the length or content of the appellate court's decision.[2] Thus, the petition for a writ of

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[2]Although petitioner's stated "questions presented" involve only the issue of whether the court of appeals erred by failing to separately state findings of fact and conclusions of law, by implication, petitioner generally attacks the trial court's findings as erroneous. However, petitioner has failed to identify any specific error, and, he has not stated any special or important reason, as required by Rule 17 of the Rules of the Supreme Court, why this Court should review the district court's decision. The court of appeals has held that the district court's findings were not clearly erroneous. This

certiorari should be denied because findings by the appellate court would be a meaningless exercise of valuable judicial resources.

Court should not grant a writ of certiorari merely to review evidence or inferences drawn from the evidence. General Talking Pictures Corp. v. Western Electric Corp., 304 U.S. 175 (1938).

CONCLUSION

For the reasons stated above, AT&T Technologies, Inc. requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief of Defendant-Appellee has been forwarded to Mr. Gary S. Carson, 1808 Franklin Avenue, Columbus, Ohio 43205, this 1st day of ~~October~~ November, 1984.

David R. Kelleher

David R. Kelleher

84-906

No.

Office - Supreme Court, U.S.
FILED
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

GARY CARSON PRO SE PETITIONER

v.

WESTERN ELECTRIC CO., INC.
NOW DOING BUSINESS AS AMERICAN
TELEPHONE & TELEGRAPH TECHNOLOGIES, INC.

REPLY BRIEF OF PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

The Constitutional Question (14th Amendment), respecting Petitioner's due process and equal protection of the laws, rights was properly before the District Court and the Sixth Circuit Courts of Appeals.

Whether the courts below applied proper standard to essentially undisputed facts when they determined that petitioner had failed to carry his burden of proof under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. and 42 U.S.C., §1981.

Petitioner, in his complaint to the District Court had requested injunctive relief respecting all of the issues adjudicated at trial: whether or not the courts below breached their duty to uphold Rule 52(a) Federal Rules of Civil Procedure requiring them to find the facts and state the conclusions of law which constitute the grounds of their action.

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

PETITIONERS REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I. Irrelevancy of Respondent's Legal Arguments

Respondent's brief in opposition to petition for a writ of certiorari carefully avoids addressing the genuine issues of fact that Pro Se Petitioner has raised on appeal to this Court. The importance and substantiality of the questions presented have not been denied by Respondent, nor can they be.

The District Court's 30-page opinion, now before this Court and appended to Respondent's brief in opposition, together with the Court of Appeals ambiguous, non-definitive, summary affirmation clearly shows misapplication of the law here.

In the District Court's opinion, p. 14, he illustrates his foundation.

This Supreme Court's tripartite requirements to "analyze the charges in light of ALL the surrounding facts and circumstances." 1st level: Petitioner proving his prima facia case against Respondent, 2nd level: Respondent's effort to show a non-discriminatory reason for employee's rejection, 3rd level: Petitioner's chance to rebut by the preponderance of the evidence that Respondent's reasons were not true, but pretexual.

Rule 52(a) presupposes that the trial court, having opportunity to first-hand observe and rule in factual disputes, judge credibility of witnesses, their demeanor, etc., is best suited to fairly rule in matters of equity. However, that is not the case where, as here, Rule 52 (a) is misspplied. United States v. General Motors Corp., 384 U.S. 141 (1966). The facts are essentially undisputed. The

only witness the District Court criticized was employee William Ralph, opinion at 21, 22 whose testimony was minor in relation to the preponderance of the other evidence, and plays a restricted role and was not at issue before the Court of Appeals.

II. The Law Requires the Appellate Courts to Determine the Facts Independently

Although the letter of the law found in Act of Feb. 16, 1875, Ch. 77 §1, 18 Stat. 315, requiring Federal Circuit Courts of Appeals to find every fact material to its conclusions and upheld by this Court in E.A. Packer v. New Jersey Lighterage Co., (1891) 140 U.S. 360, appears to have been repealed, the Spirit of the law lives on and has become part of the Federal Common Law and should not be disparaged by this Court. Indeed the

case at bar is in conflict with the Sixth Circuit's own case law, Carpenters District Council, etc. v. Cicci, 261 F.2d 5 Sixth Circuit (1958), also conflicting this Court is Jacobellis v. State of Ohio, 378, U.S. 84 (1964).

In Guzick v. Drebus, 431 F.2d 594 (1970) Sixth Circuit, the court held:

> [1] We believe that the Supreme Court has commanded that, when dealing with questions of constitutional magnitude, we are not at liberty to accept the fact trier's findings merely because we consider them not "clearly erroneous" as that term is employed in Rule 52(a) F. R.Civ.P. We must make our own examination of the material from which decision is made. Feiner v. New York, 340 U.S. 315, 322-325, 71 S.Ct. 303, 95 L.Ed. 267 (1951) (Black Dissenting); Edwards v. South Carolina, 372 U.S. 229, 235, 83 S.Ct. 580, 9 L.Ed.2d 697 (1963); Jacobellis v. Ohio, 378 U.S. 134, 189, 84 S.Ct. 1676 12 L.Ed.2d 793 (1964).

[2] Obedient to that rule, we have made our own examination of the record before us and are persuaded that the factual findings of the District Judge are fully supported by the evidence and we agree with them.

CONCLUSION

The Sixth Circuit Court of Appeals has rendered a decision in conflict with its own previous decisions and other appellate courts and has so far departed from the accepted and usual course of judicial proceedings in not finding its facts material to its conclusions and has so far sanctioned a misapplication of law and aforementioned plain error by the lower court as to call for an exercise of this court's powers of supervision and to uphold the integrity and reputation of these proceedings.

Therefore, this Court should issue a Writ of Certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,

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(614) 258-7492

CERTIFICATE OF SERVICE

I, Gary Carson, Petitioner Pro Se and appellant herein, hereby certify that on the 21st day of November, 1984, I served a copy of the foregoing to the Supreme Court on the above named defendant and appellee by depositing same in a United States Post office with first class postage prepaid, addressed to the attorney of record of said defendant and appellee at his post office address to wit: David R. Kelleher, 65 E. State St., Columbus, OH 43205.

Gary Carson

Gary Carson